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PROCREATIVE JUSTICE
AND THE RECOGNITION OF MARRIAGE

by Scott FitzGibbon¹

"Make thee another self, for love of me."

-- Shakespeare, Sonnet X²

*"The basic principles of justice are to live honorably, not to harm any other person,
and to render each his due."*

-- Justinian, Digest³

INTRODUCTION

If you procreate at all, you should try to do it well. If you and another person procreate together, you should try for a good relationship. Goodness in procreation and goodness in a procreative relationship are the subjects of this paper. More specifically, *justice* in procreation is the subject. Justice makes special demands on those who procreate. It applies to the associations they establish to conduct the projects of procreation.

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² Line 13 (in the original this line ends with a comma).

³ THE DIGEST OF JUSTINIAN Book I, 10 (vol. 1 of the edition edited by Theodor Mommsen, Paul Krueger & Alan Watson, eds., 1985). The quotation above revises this translation, which is, in fuller context: "Justice is a steady and enduring will to render unto everyone his right. 1. The basic principles of right are: to live honorably, not to harm any other person, to render to each his own." The Latin is: "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*").

The usual instance of an association for the projects of procreation is an exclusive and aspirationally permanent affiliation between a man and a woman. In our day, various other arrangements are proposed, notably uncommitted cohabitational connections, arrangements between persons of the same sex, polygamy, polyandry, and “polyamorous” relationships involving shifting populations of various types.⁴ To assess such proposals wisely, to determine what is just in the matter of structuring associations for procreation, and to sustain sound procreative associations, are the great problematics of our age.

What criteria should be applied? Findings from the social sciences are suggestive but sketchy. No comprehensive standards have emerged for determining when an associational structure is appropriate and just for the projects of procreation. This paper proposes such standards.

Applying the standards here proposed leads to the conclusion that marriage between a man and a woman can be procreatively just. The structure and elements of marriage are wise ones -- its foundation in an oath of fidelity and in a certain unique kind of love; its commitments to permanence and exclusivity. None of the other forms fills the bill.⁵

Forms which fail to fill the bill should not in all cases be prohibited or condemned. Plainly some procreatively oriented affiliations which fall short in one way or another deserve some measure of recognition. Sometimes exigencies preclude the optimal choice; no one would abolish orphanages or foster care. Sometimes optimal arrangements are supplemented with more limited ones; no one thinks it is wrong to hire a nanny. This paper proposes a set of criteria which identify the most appropriate form for a basic procreative affiliation.

This paper proposes that fully procreatively just affiliations -- the ones which satisfy the criteria developed here -- deserve special support and recognition. It proposes that procreative justice requires such recognition. This paper proposes that it is unjust to conflate and revise the usual categories so as to confuse procreatively just affiliations with other forms. It discusses the harm that ensues.

⁴ See also “The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children’s Needs” (2006) (a publication sponsored by the Commission on Parenthood’s Future, Elizabeth Marquardt, Principal Investigator) (detailing various proposals to redefine the term “parent” including proposals to include sperm donors and surrogate mothers as parents); New Zealand Law Commission, “New Issues in Legal Parenthood,” (Report No. 88, April 2005) available at <http://www.austlii.edu.au/nz/other/nzlc/report/R88/R88.pdf> (accessed October 8, 2006) (proposing the legal recognition, in some circumstances, of three parents for one child).

⁵ Owing to space limitations, only passing attention can be paid to forms other than marriage, cohabitation, and same-sex associations.

PART ONE: PROCREATION

“Procreation” refers in part to “making” or “producing,” but goes beyond those terms. You make pies, you make mistakes, even, but you do not “procreate” them. Perhaps this is because procreation involves making or producing living things. Still, a scientist has not procreated when he colonizes bacteria. Procreation involves replication; reproduction of life; the making of something which resembles the maker. It involves developing and extending the maker into a new generation (and into generations thereafter). Only the sheep can procreate a sheep. The scientist can procreate humans.

Procreation is not just a matter of biology: it includes the development of the mind and heart and spirit as well. It means doing your part in commencing the existence of another human being and bringing him along towards responsible adulthood. It means fostering his full personal development, including development of the capacity himself to procreate some day.

It involves some degree of participation, in other words, in the procreation of subsequent generations as well. It aims at the full maturity of beings who will be in important ways extensions of the parents. It aims at offspring who may themselves pursue the projects of their parents and who may extend the line on into posterity. It is thus one of the great goods of life and a central element of human flourishing.⁶ It enters the procreator in the procession of “illustrious men whose good works have not been forgotten”:

⁶ Compare the discussion of “generativity” in ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 267 (1963):

“Generativity ... is primarily the concern in establishing and guiding the next generation [T]he concept generativity is meant to include such more popular synonyms as *productivity* and *creativity* * * * [S]ome young parents suffer, it seems, from the retardation of the ability to develop this stage. The reasons are to be found in . . . excessive self-love based on a too strenuously self-made personality; and . . . in the lack of some faith, some ‘belief in the species,’ which would make a child appear to be a welcome trust of the community.”

For further observations and references, see JOHN SNAREY, *HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY* 18-23 (1993)(distinguishing biological generativity, parental generativity, and social generativity); Dan P. McAdams, *Attachment, Intimacy, and Generativity*, 11 *PSYCHOLOGICAL INQUIRY* 117 (2000):

“Our research into the life stories of highly generative adults suggests that men and women who have distinguished themselves for their strong and caring commitments to the next generation typically construct narrative identities in which empathy for others, especially those who are weaker or who suffer in some way, emerges clearly in early life-story scenes Highly generative adults show an expanded radius of care, and they envision their futures in terms of long-term commitments to the welfare of others {t}hey consistently adopt the attitude of the hopeful caregiver, looking to the future with anticipation that those things they care for will grow and flourish. Undergirding their hopefulness is what Erikson (1963) identified as a ‘belief in the species’ (p. 267), a faith in the worthwhileness of the human enterprise.”

“In their descendants they find
a rich inheritance, their posterity.
Their descendants stand by the commandments
And, thanks to them, so do their children’s children.”⁷

PART TWO: AFFILIATION

The problem of procreative justice includes a problem of affiliation. To be procreatively responsible you must relate well to your offspring and relate well to others who participate with you in the basic projects of procreation.

Affiliation – friendship, using that term broadly -- is a basic aspect of well-being. Friendship makes us fully human. Without it a person is, as Aristotle says, “t]ribeless, lawless, hearthless” and “either a bad man or above humanity.”⁸

“H]e who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god”⁹

Man, as Aristotle observes, is a social animal,¹⁰ a couple-forming animal,¹¹ and a household-forming animal.¹² We are creatures who flourish best in and through

⁷ ECCLESIASTICUS 44 10-13 (NEW JERUSALEM BIBLE, 1985 ed., at 1141).

⁸ ARISTOTLE, POLITICS 1253a 3-4, in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1986, 1988 (Jonathan Barnes, ed., B. Jowett, trans., 1984)(hereinafter referred to as “Aristotle, *Politics*”).

⁹ *Id.* 1253a 28-29 (page 1988 in the Jowett translation).

¹⁰ See *id.* 1253a 2-4 (page 1987 in the Jowett translation)(“man is by nature a political animal.”). The term “political” here does not refer only to governmental affairs. The Greek is “*politikon*,” and relates to the *polis* --- the city -- including not only its administrative or government aspects but also families and associations and all of civic life. Aristotle’s point is that man is by nature a city-forming, city-living, city-participating being. That is why the term “social” is used in the text *supra*. Aristotle also identifies man as *politikon* in *id.* 1278b 19 (page 2029 in the Jowett translation), in NICOMACHEAN ETHICS 1097b 11, 1162a 17 & 1169b 17-19 in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729 at 1734, 1836 & 1848 (Jonathan Barnes, ed., W. D. Ross, trans. (rev. by J.O. Urmson), 1984)(hereinafter referred to as “Aristotle, *Nicomachean Ethics*”) and in HISTORY OF ANIMALS 488a 9-20 in I THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 774, 777 (Jonathan Barnes, ed., d’A. W. Thompson, trans., 1984).

¹¹ Aristotle, *Nicomachean Ethics*, *supra* n. 10, 1162 16-17 (page 1836 in the Ross translation)(“Between man and wife friendship seems to exist by nature; for man is naturally inclined to form couples . . .”).

our involvement with one another.¹³ These observations correspond to common experience. From your birth announcement through your obituary, who you are is intimately bound up with your membership in a family and with your other associations.

PART THREE: JUSTICE

Justice is the most fundamental social virtue. It involves all that is requisite in conduct affecting another person. Thus, in the most fundamental sense, justice involves understanding that another person *is* another person; a person comparable to oneself; a person who is, like oneself, entitled to decent treatment. The radically unjust person never gets this idea. The basically just person does get it. He accepts the demands of commutativity and reciprocity in human relations. Justice involves seeking common ground; applying a common normativity; being fair by applying the same standards in the same way to one person as to another; to others as to oneself.

Justice involves three basic principles. The first is not to harm. Subject (as all the requirements of justice must be) to excuses and justifications such as those founded on duress and impossibility, you act unjustly if you damage someone in an important way. Underlying this requirement lies the insight, grasped by the just man and not by the radically unjust one, that harm is a bad thing in a general way so that everyone, not only he himself, deserves to be free of it.

The second principle of justice is to “render each his due.” This requires, of some people in some situations, that they act affirmatively to assist or protect. Justice for a lifeguard, for example, involves more than not drowning people. He should rescue the distressed swimmer. Perhaps he has implicitly promised to do so; perhaps society has appointed him to a sort of office which requires him to do

¹² “*koinonikon anthropos*” and “*oikonomikon zoon*.” ARISTOTLE, EUDEMIAN ETHICS 1242a 22-25, in II THE COMPLETE WORKS OF ARISTOTLE 1922 at 1968 ¶. Barnes, ed., J. Solomon, trans., 1984)(hereinafter referred to as “Aristotle, *Eudemian Ethics*”)(“[M]an is not merely a political but also a household-maintaining animal, and his unions are not, like those of the other animals, confined to certain times, and formed with any chance partner, whether male or female; but . . . man has a tendency to partnership with those to whom he is by nature akin.”)(elision in the text as quoted; note omitted).

¹³ Compare MARCUS TULLIUS CICERO, DE AMICITIA 17 (44 B.C.) in CICERO ON OLD AGE AND ON FRIENDSHIP (Frank O. Copley, trans., 1971, at 43, 53)(hereinafter referred to as “Cicero, *De Amicitia*”)(“All I can do is to urge you to put friendship ahead of all other human concerns, for there is nothing so suited to man’s nature, nothing that can mean so much to him, whether in good times or in bad.”). Cicero attributes the words to Laelius.

it; swimmers have probably relied upon him. No one else, perhaps, can swim so well or foresee so accurately the struggles of the drowning man. Other instances of special duty to render what is “due” can readily be adduced. A trustee is obliged to assist the beneficiaries and an executor to protect the estate. After a shipwreck, the only man with extra food should feed the survivors and the only man with knowledge of the native language should teach the others. Those who understand the indigenous society should help establish good relations.

The just person discerns what conduces to other people’s good and “gets the idea” that other people’s well-being can have a bearing on his own projects. He accepts – as a self-indulgent or self-involved person will not – that another person’s concerns have a traction on his own life, drawing him into a course of assistance, service, and sometimes even self-sacrifice.

A third aspect relates justice to practices of honor and the recognition of duty, office, and merit. It is just to honor the honorable and unjust to disgrace them; just to accredit what is creditable and not confuse it with the irrelevant or disgraceful; just to recognize someone for who he is and not to assign him to an order which is not his own. It is just to recognize someone as a distinctive person and not to reduce him to a “stereotype” or an indistinguishable particle in a larger aggregate. Bad social ideology violates these requirements. A communist or a fascist is unjust in this way. He thinks stereotypically, ignores individuality, places people in meretricious categories (“bourgeois,” “Aryan”), and assigns unjustified opprobrium and unmerited praise.

The just person “gets the idea” of honor and dishonor and the good of knowing which is which; he grasps the importance of recognizing things as what they really are. A person who is hostile to clear distinctions and anxious to avoid becoming “judgmental” will not be just in this way.

In all these ways the just man not only acts but also thinks and perhaps even feels as he should. The truly just person avoids harm, renders what is due, and conforms to the requirements of honor, because he sees and appreciates the merits of acting in those ways.¹⁴ As Aristotle observes, we would not call

¹⁴ As Aristotle says, “in order to be good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves.” *Nicomachean Ethics*, *supra* n. 10, 1144a 18-20 (page 1807 in the Ross translation). “The agent . . . must be in a certain condition when he does them; in the first place he must have knowledge, secondly, he must choose the acts, and choose them for their own sakes, and thirdly his action must proceed from a firm and unchangeable character.” *Id.* 1105a 30 – 1105b 1 (page 1746 in the Ross translation). He should deliberate carefully and understand the good of what he does, since choice involves “consideration and deliberation.” Aristotle, *Eudemian Ethics*, *supra* n. 12, 1226b 8 (page 1942 of the Solomon translation).

someone fully just who did the just thing but only under compulsion.¹⁵ Nor would we call someone just who did the just thing but only in order to satisfy his needs, or only as a consequence of his emotions. We would not call a parent just, for example, who performed the duties of parenthood only out of a “need for belongingness”¹⁶ or a “dyadic intention toward a ... dependent growing out of a feeling toward that dependent,”¹⁷ conforming to a theory from the social sciences that “[w]hat the parent does is to feel.”¹⁸ A fully just person acts as he does owing to his appreciation of the good of justice.

PART FOUR: JUSTICE IN AFFILIATIONS INVOLVING PROCREATIVITY

I. Justice between Procreator and Procreated.

Consider how the requirements of justice may apply in the case of a baby or a child. His vulnerability to harm is extensive. His “due” may be great, as his circumstances bear comparison with the inexperienced swimmer and the castaway who needs food and shelter and successful integration into the indigenous society.

Consider how the requirements of justice may apply to you, as his procreator. You may be lifeguard, trustee, and estate executor rolled into one. You may be food owner, language teacher, and cultural guide; and you may be his greatest social intermediary, from the affiliations of the household on

¹⁵ *Nicomachean Ethics*, *supra* n.10, 1144a 12-18 (page 1807 in the Ross translation).

¹⁶ See Catrin Finkenauer & Wim Meeus, *How (Pro-)Social Is the Caring Motive?*, 11 PSYCHOLOGICAL INQUIRY 100, 101 (2000)(available on jstor)(An “important motive for caregiving may be found in the human need for belongingness People go to great lengths to feel they belong and to avoid feeling lonely.”). For references to authorities which account for attachments based on needs, see David C. Bell & Alan J. Richard, *Caregiving: The Forgotten Element in Attachment*, 11 PSYCHOLOGICAL INQUIRY 69, 76 (2000)(available on jstor).

¹⁷ David C. Bell & Alan J. Richard, *Caregiving: The Forgotten Element in Attachment*, 11 PSYCHOLOGICAL INQUIRY 69, 79 (2000)(available on jstor). See generally discussions of this theory throughout Volume II, Issue No. 2 of PSYCHOLOGICAL INQUIRY and David C. Bell & Alan J. Richard, *Authors’ Response: The Search for a Caregiving Motivation*, 11 PSYCHOLOGICAL INQUIRY 124 (2000)(available on jstor).

¹⁸ David C. Bell & Alan J. Richard, *Caregiving: The Forgotten Element in Attachment*, 11 PSYCHOLOGICAL INQUIRY 69, 75 (2000)(available on jstor):

“{T}he parent looks into the child’s eyes. What the parent does is to feel * * * {T}his is not a thinking moment. It is a feeling moment. This moment and all the lifetime of moments following when I love her and try to understand her and try to meet her needs with my limited resources are feeling moments. Cognitions will be important in all these moments But these cognitions are not what motivate the parent’s actions – emotions are”.

outwards into the wider world. Struggling through childhood, he will look to you for guidance; navigating through the difficult waters of adulthood, he will often call you to mind. His honor is involved. You are in a position to integrate him, well or poorly, into the order of your extended family and thence to afford him his place in society. You are his link to the affiliational chain of his ancestors and the ancestors of his descendants. You are a major determinant of how he “gets the idea” of systems of honor and a major guide to how he in later life will appraise merit and demerit, apportion praise or blame, and recognize the standing and roles of others.

If you are a just person, you must “get it” that this state of affairs has a traction on your own life. Implausible though it may seem during the months when he is a squalling infant, justice requires that you “get it” that he is another human being – like you when you were a baby – and that his future will be shaped by you as yours was shaped by your parents. It requires you to determine what is “due” to him by considering the basic goods of life and ascertaining your likely effect on whether he participates in those goods, bearing in mind the circumstances in which he is likely to find himself. It requires you to “get it” that he will be a grown up person like you some day and likely will procreate himself.

II. Justice Among Procreators.

Affiliations among those who work together on the basic projects of procreation (here, “procreative affiliations”) pay the rent and buy the groceries; more important still, they furnish examples to the offspring. Children develop morally through a process of modeling:

“A young child is able to latch onto the moral kind, bravery, or lying, by grasping central paradigms of that kind Moral development is . . . something much more complicated than simple concept displacement. It is: enlarging the stock of paradigms . . . developing better and better definitions of whatever it is that these paradigms exemplify; appreciating better the relation between straightforward instances of the kind and close relatives ; and learning to adjudicate competing claims from different moral kinds”¹⁹

¹⁹ Gareth Matthews, *Concept Formulation and Moral Development*, in PHILOSOPHICAL PERSPECTIVES ON DEVELOPMENTAL PSYCHOLOGY 175, 185 (James Russell ed., 1987). See generally Lawrence J. Walker, Karl H. Hennig & Tobias Krettenauer, *Parent and Peer Contexts for Children’s Moral Reasoning Development*, 71 CHILD DEVELOPMENT 1033 (2000) (available on jstor):

“psychoanalytic theory emphasizes early parent/child relationships in the development of conscience through the mechanism of identification and consequent internalization of values.

Children's well-being – and much of what they do in later life – is thus affected intensely by the character of the affiliations around them. “Research clearly demonstrates” what common sense would in any case suggest: “family structure matters for children.”²⁰ Doing justice to offspring thus requires procreators to establish well ordered relationships with one another.

This section proposes seven requirements for justice in structuring procreative affiliations.²¹ The first two requirements respond to the offspring's good in general. The next four respond to the offspring's good as regards his own affiliative future, looking to the day when he himself will form friendships and other important associations. The final requirement looks to his procreative future. Procreative affiliations which fulfill these requirements are here called “Procreatively Just Affiliations.”

A. The Metaphor of the House; the First Two Requirements of Justice in Procreative Affiliations.

What sort of house is suitable for raising a child? A house may be a metaphor for a household.

1. *The First Requirement.* – A procreatively appropriate house is not built on sand and will not collapse in a windstorm. It gives the offspring his “due” in the sense that it affords what its residents need from a house: shelter from the rain, warmth in winter, and facilities for cooking. The metaphor illustrates one aspect of the procreative affiliation: it is a “tasked” association. It aims at instrumental

Social-learning theory . . . emphasizes the power of models and so has also focused on parents' role in displaying and reinforcing appropriate behaviors. Cognitive development theory . . . holds that interactions with peers are more potent . . .”

(p. 1033). This study finds that both parents and peers “have a role to play.” (p. 1047).

²⁰ Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS (June, 2002), available at <http://www.childtrends.org/files/Marriage8602..pdf>. (accessed August 22, 2006):

“R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children.”

²¹ Specifically, it proposes these standards for what might be called “primary” procreative affiliations. These standards are not proposed to be applied in their entirety to the nanny or the wet nurse.

goods. Whereas other sorts of association might be arranged *ad libitem*, or as an exercise in risk, adventure, and the recurrent temptation of fate -- like Zelda and Scott Fitzgerald during their early years together²² -- procreative affiliations are dedicated to supplying an offspring's necessities. They should pay the rent, for example, and supply the food. These points can be summed up as the first requirement of justice for procreative affiliations: *they should be well ordered towards supplying an offspring's practical needs.*

2. *The Second Requirement.* – More abstractly: perhaps a house ought to be in a sense “honorable” in that it should convey true and not disordered implications about the residents and their appropriate roles. It should not be a slave quarters nor, in a republic, should it be a palace. It should be human-sized, with human-sized rooms and hallways, well suited to balanced, person-to-person, on-the-level relationships. Fascist architecture, complete with monstrous stairsteps and cavernous hallways filled with heroic fascist sculpture would be procreativity inappropriate. So also would the temporary shelters of Woodstock.

Applying similar criteria: the affiliations of the *household* should be “honorable,” in the sense that they should conform to a reasonable order of honor, merit, and demerit, and reflect a reasonable recognition of office and role. Honor implies not just one affiliation but an affiliational system. In a household or any such system, people who do their part should be acknowledged as doing their part and people who stand as pillars of the household establishment should not be confused with those whose involvement is sporadic and self-serving.

Married couples recognize this aspect of procreative justice when they promise to “love, honor and cherish” one another and when they set their shoulders to the tasks of maintaining a household. A husband would violate this requirement of procreative justice by bringing girlfriends in to live and demanding that they be treated with respect. A polyamorous affiliation – one with members celebrated for amorous amenability rather than procreative dedication – would be procreativity unjust under this criterion.

B. The Metaphor of the Sculptors; Four Further Requirements of Justice in Procreative Affiliations.

The first two requirements of procreative justice might be satisfied by colleagues whose associations were deeply chilly. People who cared little about one another's well-being and perhaps even disliked one another could perform

²² Some of the many Fitzgerald biographies are cited in notes 26 & 27, *infra*.

the practical tasks of a household and treat one another with grudging respect. This suggests a search for further requirements.

Suppose two sculptors undertake to carve a statue out of some mythological material which has a sort of life of its own. It gradually changes shape in response to variations in its environment such as wind and light and it changes responsively to the characters and personalities, beliefs, intentions, and motives of the sculptors themselves. If they dislike sculpting and are disappointed with the statue it becomes less attractive. If they determine to destroy it, it shrivels up. If they dislike *one another*, and each plans to harm the other, the statue, similarly, acquires a malevolent aspect. Suppose further that this statue will spring up some day and take on life-like characteristics like Pinocchio, and that its character and conduct as well as its outward form will reflect the influences of the sculptors. If the sculptors are malicious or insensitive, the statue may become that way as well. If they are unfriendly to one another, the statue's capacity to affiliate and befriend will be affected.

The metaphor illuminates another aspect of the procreative affiliation: it is a model.²³ Children's affiliational well-being: their own marriages and friendships in later life – are intensely affected by the affiliational order of their upbringing. Affiliational character is formed by a process of modeling on the close affiliations of early life.²⁴ Judith Wallerstein reports:

²³ See JOHN SNAREY, HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY 297 (1993)(findings suggest that men who were “highly and positively involved in promoting their children's social-emotional development during adolescence” based their approach to fathering on “a mixture of modeling and of rectifying their own experience of being fathered.”). See generally *id.* at 276-80 (reviewing the studies which demonstrate the impact of fathering – including the father's sharing of parenting with the mother – on the offspring's own parenting practices); ANDREW J. CHERLIN, PUBLIC AND PRIVATE FAMILIES : AN INTRODUCTION 309 (4th ed., 2005)(concluding, after a review of the literature, that “it is better for children to be raised by two parents than one.”); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 MARRIAGE & CHILD WELLBEING 75, 90 (2005)(available on jstor)(“Research clearly demonstrates that children growing up with two continuously married parents are less likely to experience a wide range of cognitive, emotional, and social problems, not only during childhood, but also during adulthood. Although it is not possible to demonstrate that family structure is the cause of these differences, studies that have used a variety of sophisticated statistical methods . . . suggest that this is the case.”); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279 (2005)(reviewing several studies and stating (at page 288) that “[o]n average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings.”).

Authorities on modeling as a guide to child development in general are set forth in notes 19-20, *supra*. The effects of cohabitation compared to marriage is discussed at notes 71-73 *infra* and the effects of divorce are discussed at notes 76-79 *infra*.

²⁴ See Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 MARRIAGE & CHILD WELLBEING 85 (2005)(available on jstor)(“Another benefit of a positive co-parental relationship is the modelling of interpersonal skills, such as

“A central finding of my research is that children identify not only with their mother and father as separate individuals but with the relationship between them. They carry the template of this relationship into adulthood and use it to seek the image of their new family.”²⁵

Were progeny not involved, there might be little objection to conducting an association largely with an eye to generating tumultuous raw material for semi-autobiographical fiction (as may have been the case with Zelda and Scott Fitzgerald).²⁶ But where offspring are involved, the procreative affiliation should be conducted with a mind to the example presented.²⁷ It should model successful affiliation, not only by way of efficiency in performing tasks, but also by way of the noninstrumental goods. It should model those elements which make affiliation good for its own sake, and establish it as a basic dimension of human life.

showing respect, communicating clearly, and resolving disputes through negotiation and compromise. Children who learn these skills by observing their parents have positive relationships with peers and, later, with intimate partners.”); Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAMILY 191 (2005), available at www.blackwell-synergy.com (accessed December 2, 2006) (“Presumably, children with maritally distressed parents are less likely than other children to observe and learn positive behaviors that facilitate long-term bonds with others. These children may reach adulthood with poorly developed relationship skills and a repertoire of interpersonal behaviors that undermine marital satisfaction and stability.”). See STEPHANIE STAAL, *THE LOVE THEY LOST: LIVING WITH THE LEGACY OF OUR PARENTS’ DIVORCE* 28 (2000) (reporting, based on personal experience and interviews with 120 adult offspring of divorce, that “[o]ur parents’ marriages provide us with the primary model of intimacy that we internalize and refer to for comparison when we get older. When parents divorce . . . we are left to invent intimacy on our own terms”). See Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 299-302 (2005) for a review of the literature on the effects of parental marriages on the marriages and other procreational practices of the offspring. See generally Mario Mikulincer, Phillip R. Shaver & Keren Slav, “Attachment, Mental Representations of Others, and Gratitude and Forgiveness in Romantic Relationships,” in *DYNAMICS OF ROMANTIC LOVE: ATTACHMENT, CAREGIVING, AND SEX* 190, 195 (Mario Mikulincer & Gail S. Goodman, eds., 2006) (“There is extensive evidence that attachment anxiety and avoidance in adulthood are associated with negative appraisals of parents.”).

²⁵ JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* xxix (2002). A fuller quotation from this passage is in note 80, *infra*.

²⁶ See SALLY CLINE, *ZELDA FITZGERALD: HER VOICE IN PARADISE* 111 (2002) (“Zelda and Scott . . . achieved their stories by obsessively mining their own lives and each other’s for material and created their fiction almost entirely from personal experience.”).

²⁷ Zelda’s and Scott’s daughter Scottie described her childhood as a good one: see ELEANOR LANAHAN, *SCOTTIE THE DAUGHTER OF . . . : THE LIFE OF FRANCES SCOTT FITZGERALD LANAHAN SMITH* 36 & 96 (1995). But she can be suspected of what is called “denial.” See *id.* at 62 & 71.

1. *The Third and Fourth Requirements.* -- Benevolence and knowledge are fundamental elements of affiliation. You would certainly not be friends if you wished one another ill; you would certainly not be friends if you did not even know one another; and you would not be *good* friends unless each of you cared quite a bit for the well-being of the other²⁸ nor unless you knew one another *well*. Friendship involves shared benevolence and knowledge; benevolence leading on to discourse: “sharing discussion and thought,” as Aristotle observes.²⁹ Thoroughgoing friendship involves benevolence as to a fulsome range of the friends’ projects and knowledge as to much of their actions and plans. Exercising their benevolence and deepening their knowledge, friends participate together, as Aristotle observes, in much of life.³⁰

These two virtues can, therefore, be identified as the objects of the third and fourth requirements of procreative justice: *procreators should model the virtues of benevolence and knowledge and their integration into an affiliation.* Procreative affiliates should wish each other well and act well towards one another. They should know one another, and they should aspire to know one another well.³¹

Married couples recognize these requirements of procreative affiliation when they promise to love and cherish one another. Studies reflect the importance of benevolence and knowledge within marriage when they report that marital practices highly predictive of divorce include negative communication patterns

²⁸ See Aristotle, *Nicomachean Ethics*, *supra* n. 10, 1155b 31 -- 1156a 10 (pages 1826-27 in the Ross translation):

“[T]o a friend we say we ought to wish what is good for his sake. . . . G]oodwill when it is reciprocated being friendship. * * * To be friends, [people] . . . must be mutually recognized as bearing goodwill and wishing well to each other”

²⁹ *Id.* 110b 11-12 (page 1850 in the Ross translation).

³⁰ See *id.* 1170b 10-13 (page 1850 in the Ross translation)(a friend “needs . . . to be conscious of the existence of his friend . . . and this will be realized in their living together and sharing in discussion and thought; for this is what living together would seem to mean in the case of man, and not, as in the case of cattle, feeding in the same place.”).

³¹ Must friends, then, be in agreement; and believe the same things? Perhaps not: many successful marriages and other affiliations have been conducted by people of different religions and political persuasions. It does appear, however, that friends *seek* agreement. Discussion and thought have concurrence as an aim, and especially so discussion and thought between people who know one another well. Certainly friends must achieve some degree of agreement as to some important matters. Their projects of mutual benevolence must be founded on some common understanding of one another’s needs. Their conversations cannot progress without some commonality of belief as to their procedures and ends of discourse. Procreative affiliates must agree as to procreation.

such as criticism, defensiveness, contempt, stonewalling, and rejection of a wife's influence.³²

An association could not be fully procreatively just if it were based, as some modern writers recommend, on emotion rather than cognition,³³ nor if it were attempted by people who were too selfish, narcissistic, confabulatory or delusional to understand one another well (as may have been the case with Zelda and Scott Fitzgerald).³⁴ Such a couple would be likely to transmit their cognitive deficiencies on to the parent-child affiliation and thence into the next generation. "I was an imaginary daughter," wrote Scottie Fitzgerald, "as fictional as one of his early heroines."³⁵ One of Scottie's own kids later said much the same thing about himself: "We were characters in our mother's novel."³⁶

2. *The Fifth Requirement.* – Fidelity is a fundamental component of affiliation.³⁷ Steadiness grounds affiliational benevolence, which is more than a matter of "random acts of kindness," as the bumper sticker puts it. True friends stand by you "through thick and thin." Steadiness is a cornerstone of affiliational knowledge, which is not a matter of episodic insights and brief glimpses of the truth. Knowledge between true friends is, rather, hard-headed and clear-eyed, informed by an honest and extensive exchange of views, and not

³² Notably, John M. Gottman, James Coan, Sybil Carrere, & Catherine Swanson, *Predicting Marital Happiness and Stability from Newlywed Interactions*, 60 JOURNAL OF MARRIAGE AND THE FAMILY 5 (1998) (available on jstor); John Mordecai Gottman & Robert Wayne Levenson, *The Timing of Divorce: Predicting When a Couple Will Divorce Over a 14-Year Period*, 62 JOURNAL OF MARRIAGE AND THE FAMILY 737 (2000) (available on jstor).

³³ See generally E.J. GRAFF, WHAT IS MARRIAGE FOR? 251 (1999) ("Western marriage today is a home for the heart: entering, furnishing, and exiting that home is your business alone. Today's marriage – from whatever angle you look – is justified by the happiness of the pair." "Our society has endorsed" the conclusion that the purpose of marriage is "the refreshing of the individual spirit."). For authorities commending emotion as the fundamental element of "attachment" see note 17, *supra*.

³⁴ See SALLY CLINE, ZELDA FITZGERALD: HER VOICE IN PARADISE 152 (2002) ("Hemingway recalls Scott telling several versions . . . of an episode involving] Zelda falling in love with a French aviator. The later versions, according to Hemingway, were less sad and seemed to be created as useful fictional material.").

³⁵ ELEANOR LANAHAAN, SCOTTIE THE DAUGHTER OF . . . : THE LIFE OF FRANCES SCOTT FITZGERALD LANAHAAN SMITH 98 (1995).

³⁶ *Id.* at 255.

³⁷ Fidelity underlies all the virtues. Every exercise of virtue is incomplete, Aristotle indicates, unless it "proceed[s] from a firm and unchangeable character." Aristotle, *Nicomachean Ethics*, *supra* n. 10, 1105b 1 (page 1746 of the Ross translation). Only the self-governing, steady person, steadily reflecting and firmly choosing, "is at one mind with himself" when he acts and so to speak puts his entire self behind each action. Not so "inferior people," who are "at variance with themselves" (*id.* at 1166b 6-7, page 1843 of the Ross translation) and whose souls are "rent by faction" (*id.* at 1166b 19, page 1844 of the Ross translation).

occluded by the shifting clouds of self-indulged romanticism. This virtue can, then, be identified as the object of the fifth requirement of procreative justice: *procreators should model the virtue of fidelity and its integration into an affiliation.*

The traction of this requirement helps explain the intention, generally to be found among couples who marry, that their relationship be permanent rather than dissoluble upon the completion or frustration of the practical projects of maintaining a household.³⁸ The virtues of constancy help to explain the sense, commonly to be found among married couples, that their relationship finds expression even in the ordinary tasks of household life: the “irreplaceable daily fidelities.”³⁹ A short-term affiliation – a “marriage” planned in advance to expire after a term of years – would be procreatively unjust; and so also would be an affiliation whose members were prepared to split up, even though they had not set a date: a readiness to terminate the relationship or to minimize its obligations upon the occurrence of eventualities such as discomfort or dissatisfaction.⁴⁰

Procreators should not only act with consistency, they should “think consistent” in order to model consistency and stability of mind to their offspring. Fully procreatively just affiliations are founded on fully committed intentions. A contingent intention to betray or desert will affect the offspring even if it is never acted upon.⁴¹

Cohabiting couples omit the commitment to permanence⁴² and in other ways minimize obligations and so fail to satisfy this requirement. A recent study by Joanna Reed finds:

³⁸ See generally Scott FitzGibbon, *Marriage and the Good of Obligation*, 47 AM. J. JUR. 41 (2002).

³⁹ Pope Benedict XVI, address to men and women religious, Vatican City, December 10, 2005, in L'OSSERVATORE ROMANO (English language edition), December 21, 2005, at 3 (discussing not marriage but rather the fidelities of religious life).

⁴⁰ For a discussion of “marriage lite” and its effects, see notes 75-81 and accompanying text.

⁴¹ Cf. JOHN SNAREY, HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY 337 (1993) (“Marital affinity or commitment is the strongest concurrent predictor of fathers’ care for their children’s socio-emotional development.”).

⁴² More than half of cohabiters separate within five years. Larry Bumpass & Hwien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUDIES 29, 33 (2000) (available on jstor). “[C]ohabitors who don’t marry typically have a series of relationships. Half of all cohabiting relationships last a year or less, and only 1 out of 10 lasts as long as five years” ANDREW J. CHERLIN, PUBLIC AND PRIVATE FAMILIES: AN INTRODUCTION 248 (4th ed., 2005). See Harry Benson, “The conflation of marriage and cohabitation in government statistics – a denial of difference rendered untenable by an analysis of outcomes” (Bristol Family Trust, September, 2006, available at www.bcftr.co.uk/Family%20breakdown%20in%20the%20UK.pdf (accessed September 23, 2006)) (“The odds of a cohabiting couple with a young child splitting up are more than twice that of a married couple of equivalent age, income, education, ethnic group and benefits.”).

“[M]ost cohabiting parents begin cohabiting in response to a pregnancy but do not believe they should stay in a relationship because of shared children. They view cohabitation as a practical response to parenthood that allows them to coparent and share expenses yet avoid the greater expectations of commitment, relationship quality, and more traditional and scripted family roles they associate with marriage.”⁴³

Studies indicate that cohabitation adversely implicates the offspring’s own affiliational and procreative futures.⁴⁴

The Sixth Requirement. – A further requirement relates to the connection between affiliations and the societies around them. The affiliations which the offspring later forms will not subsist in isolation but will intersect with many others, including those of extended family, neighborhood, region, and nation. Man flourishes best when he participates in a general social order. This suggests a sixth requirement: *procreators should model a successful relationship between their affiliation and the society in which it is embedded.* It is not unjust to be a hermit, but it would be procreatively unjust to raise a family in a hermitage.⁴⁵

Uncritical conformity is not the ticket; and certainly where procreators find themselves surrounded by a social order which is seriously unjust this criterion will not demand that they conform to its unjust practices. The successful relationship with society identified by this sixth requirement should involve critical reciprocity; and where a social order has become thoroughly depraved, procreators may find it impossible to satisfy the sixth requirement of procreative justice. A corollary thesis to that proposed in this article for procreators can therefore be identified for societies: they themselves must be procreatively just.⁴⁶

⁴³ Joanna M. Reed, *Not Crossing the ‘Extra Line’: How Cohabitors with Children View their Unions*, 68 J. MARRIAGE & FAMILY 1117 (2006), abstract available at <http://www.blackwell-synergy.com/doi/abs/10.1111.j.1741-3737.2006.00318.x> (accessed Nov, 26, 2006). See LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* 38 (2000). “For many cohabitors, the idea of relatively easy exit with no well-defined responsibilities constitutes cohabitation’s biggest attraction. * * *

* [L]esser commitment to one’s partner extends through all aspects of life, including sexual fidelity.”

⁴⁴ See notes 71-73, *infra*

⁴⁵ See generally Scott FitzGibbon, *The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage and the Family*, 4 AVE MARIA L. REV. 581 (2006).

⁴⁶ See generally Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 172 (2005) (“the root paradigm of responsible parenthood – individual and social commitment to children and to posterity – is deeply rooted in Western and other societies . . .”).

Married couples fulfill the sixth requirement of procreative justice by exemplifying successful integration into the extended family (showing how to be a good in-law, uncle, and aunt, for example) and into the social order of neighborhood, region and nation (exemplifying, for example, good manners and social discretion).⁴⁷

C. The Seventh Requirement of Procreative Justice.

The sculptors' little Pinocchio would be headed for disaster if he turned into a real boy, grew up, and started down the usual road towards procreating himself. Little in the affiliation of the sculptors prepares him for that project. This suggests the seventh requirement of procreative justice: *the affiliation of procreators should model successful **procreative** affiliation*. It should, in other words, model the fulfillment of the first six requirements of procreative justice as applied, not just in any context, but specifically in the procreative role which the offspring is likely to assume.

The offspring, as soon as he reaches his early teenage years, is likely to start thinking and acting in ways which lead to biological procreation. Sooner than he expects, he may find that he has begotten a child and is charged with responsibility for its upbringing. He is likely to find himself affiliated with a partner in these projects.⁴⁸ These circumstances will present him with a special problematic, and with the opportunity to participate in special goods.

1. *The Special Problematic*. -- Procreators are pulled in two directions: on the one hand by the urgent demands of erotic love, on the other by the requirements of procreative justice. *Eros*, in its primitive forms, can be the enemy of procreative justice.⁴⁹ It is a sort of love,⁵⁰ but the love "of the wolf for the

⁴⁷ See generally DAVID MATZKO MCCARTHY, SEX AND LOVE IN THE HOME: A THEOLOGY OF THE HOUSEHOLD (2001). In some societies parents also have had an important role in establishing integration into the economic order. See JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 40 (2002) ("Until the modern advent of schools, families educated their children . . . by demonstrating how to care for other children, perform certain crafts, and mind cattle and agricultural fields.").

⁴⁸ See Barbara Dafoe Whitehead & David Popenoe, The State of Our Unions: The Social Health of Marriage in America 2006. Essay: Life Without Children (National Marriage Project, 2006), available on line at <http://marriage.rutgers.edu/Publications/SOOU/TEXTSOOU2006.htm> (accessed July 15, 2006) (82% of teenage girls and 77% of teenage boys said that having a good marriage and family life was "extremely important" to them; and that 84.5 % of girls and 77% of boys expect to marry (or are already married.).

⁴⁹ Compare MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE 259-63 (1996), presenting a high account of *eros*, culminating in the conclusion (at 263) that "[m]arriage is the incarnation of eros, the body of love. It is the psalms and the Song of Songs and it is

sheep,”⁵¹ characterized by “irrational desire”⁵² reaching to the point of “furor and agony”⁵³ and leading on, when it miscarries, to aggression and destruction. *Eros* can delight in conquest and humiliation,⁵⁴ whereas justice entails “getting it” that the other person should be treated as one would wish to be treated oneself. *Eros* chafes under the bonds of obligation,⁵⁵ whereas justice involves respecting the call of duty. *Eros* can be unstable, whereas procreative justice calls for fidelity. *Eros* may seek additional partners, whereas procreative justice calls for exclusivity. *Eros* may rejoice in the illicit and lead on to concealment, withdrawal from society,⁵⁶ and antipathy to convention and law, whereas procreative justice requires the couple to establish a fulsome and worthwhile relationship with extended family, neighborhood, village, and nation. *Eros* can lead to shame, whereas procreative justice deserves honor. *Eros* can lead to a

the Crucifixion, or at least it is our aspiration to all of these things.” See MAGGIE GALLAGHER, *ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE AND SEX AND WHAT WE CAN DO ABOUT IT* (1989). Much support for a high understanding of *eros* is supplied in Benedict XVI, *Deus Caritas Est* (Encyclical of December 25, 2005). These leading authors are certainly correct in emphasizing that *eros* has a higher dimension and need not be debased or destructive. As indicated, the comments in the text *supra* relate to *eros* in its primitive forms.

⁵⁰ For general discussion of types of love and entrée into the numerous authorities, see Lynn D. Wardle, *All You Need is Love?*, 14 S. CAL. REV. L. & WOMEN’S STUDIES 51 (2004).

⁵¹ I. CESLAS SPICQ, O.P., *THEOLOGICAL LEXICON OF THE NEW TESTAMENT* 9 (James D. Ernst, trans. & ed., 1994)(“the desire of the wolf for the sheep.”). See Socrates, in Plato, *Phaedrus* 241 d: “As wolves love lambs so lovers love their loves.” I THE DIALOGUES OF PLATO 246 (B. Jowett trans., 1892).

⁵² Thus the definition which Socrates places in the mouth of a persuading lover of a boy:

“[T]he irrational desire which overcomes the tendency of opinion towards right, and is led away to the enjoyment of beauty, and especially of personal beauty, by the desires which are her own kindred – that supreme desire, I say, which by leading conquers and by the force of passion is reinforced, from this very force, receiving a name, is called love.”

Phaedrus at 238 b-c, in I THE DIALOGUES OF PLATO 243 (B. Jowett trans., 1892). A valuable discussion of this passage and of *eros* generally is presented in A.W. PRICE, *LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE* 61 *et seq.* (1989).

⁵³ I. CESLAS SPICQ, O.P., *THEOLOGICAL LEXICON OF THE NEW TESTAMENT* 9 n. 13 (James D. Ernst, trans. & ed., 1994).

⁵⁴ “[T]o him who has a mind diseased anything is agreeable which is not opposed to him, but that which is equal or superior is hateful to him, and therefore the lover will not brook any superiority or equality on the part of his beloved; he is always employed in reducing him to inferiority.” Socrates, in Plato, *Phaedrus* 238 e – 239 a, I THE DIALOGUES OF PLATO 243-44 (B. Jowett trans., 1892).

⁵⁵ See THE REPUBLIC OF PLATO 574 e (Alan Bloom, trans., 2d ed., 1968, at 255)(hereinafter referred to as “Plato, *Republic*”)(describing the man dominated by *eros*, which “lives like a tyrant within him in all anarchy and lawlessness,” so that he will “stick at no terrible murder, food, or deed.”).

⁵⁶ This is an aspect of what Scruton calls “Tristanism”: “His desire * * * has divorced itself from all social norms, all forms of companionship, besides this one, of bodily union in the ‘act of darkness.’” ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 171-72 (1986).

loss of self-possession and the debasing of the character, as Pinocchio discovered when he realized that he and his friends were turning into donkeys.⁵⁷

The erotic man, Plato emphasizes in the *Republic*, may throw off the discipline of reason in favor of a mentality of dreams.⁵⁸ He may be swayed by sensations and emotions, whereas justice requires a steady and clear-headed dedication to the other person's good. He may experience a "blurring of form" and suffer the "forgetting of form,"⁵⁹ whereas justice calls for focusing on relevant distinctions. After he has lived a life governed by pleasure for a while, the erotic man may develop an antipathy to drawing certain important distinctions:

"[I]f someone says that there are some pleasures belonging to fine and good desires and some belonging to bad desires, and that the ones must be practiced and honored and the others checked and enslaved [he] throws his head back and says that all are alike and must be honored equally."⁶⁰

2. *The Special Goods*. -- From resolution of the special problematic can emerge a unique two-stranded affiliation between the procreators. Their benevolence derives an intensity from its erotic roots. They give themselves to one another physically, and in unique psychological ways as well.

Their mutual knowledge is unique. Procreative affiliates can "know" in the biblical, carnal sense.⁶¹ They may experience the heightened, rhapsodic

⁵⁷ See generally HAROLD B. SEGEL, *PINOCCHIO'S PROGENY: PUPPETS, MARIONETTES, AUTOMATONS, AND ROBOTS IN MODERNIST AND AVANT-GARDE DRAMA* (1995)(arguing that puppets and marionettes were used as a metaphor by the modernist movement for the helplessness of man under the influence of various powerful forces, including *eros*).

⁵⁸ "[W]hat he had rarely been in dreams, he became continuously while awake." Plato, *Republic* *supra* n. 55, 574 e (Alan Bloom, trans., at 255). See TERENCE IRWIN, *PLATO'S ETHICS* 664-71 (1995) for a discussion of Plato on knowledge and dreaminess.

⁵⁹ See Arlene Saxonhouse, *Democracy, Equality, and Eidê : A Radical View from Book 8 of Plato's Republic*, 92 AM. POL. SCIENCE REV. 272, 280 (1998).

⁶⁰ Plato, *Republic*, *supra* n. 55, 561 b-c. The above is a medley of the Bloom translation, *supra* n. 48, at 239 and the translation in Arlene Saxonhouse, *Democracy, Equality, and Eidê : A Radical View from Book 8 of Plato's Republic*, 92 AM. POL. SCIENCE REV. 272, 280 (1998).

⁶¹ See generally JOHN PAUL II, *THE THEOLOGY OF THE BODY: HUMAN LOVE IN THE DIVINE PLAN* 99 (1997)("To know' (*jadaq*) in biblical language does not mean only a purely intellectual knowledge, but also concrete knowledge, such as the experience of suffering (cf Is 53:3), of sin (Wis 3:13), of war and peace (Jgs 3:1; Is 59:8). From this experience moral judgment also springs: 'knowledge of good and evil' (Gn 2:9-17).").

awareness which emerges during courtship. They draw one another into unfamiliar territory:

“Heterosexual union is imbued with the sense that your partner’s sexual nature is strange to you, a territory into which you intrude without prior knowledge and in which the other and not the self is the only reliable guide. This experience has profound repercussions for our sense of the danger and the mystery of sexual union.”⁶²

The couple awakens from the dreamy eroticism of Plato’s *Republic* and opens their eyes to very real projects calling for very clear thought.

The procreators are benevolent by procreating: each gives the gift of procreation to the other. They *know* one another better by procreating: each knows the other in the capacity of procreator and, eventually, through the eyes of their offspring. They confirm their fidelity through commitment to the offspring. They extend their affiliational benevolence and knowledge and fidelity on into future generations.

“In their descendants they find
a rich inheritance, their posterity.
Their descendants stand by the commandments
And, thanks to them, so do their children’s children.”⁶³

3. *The Special Temptation of Meretricious Alternatives.* – Offspring may be enticed to fall into one or another destructive alternative to the procreatively just affiliation.⁶⁴

Cohabitation, for example, is one frequent outcome. Whereas most people today aspire to be married⁶⁵ and predict (correctly) that the formation of a stable marriage can be fulfilling and beneficial,⁶⁶ many people also think (incorrectly)

⁶² Roger Scruton, *Sacrilege and Sacrament*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET & MORALS* 3, 26 (Robert P. George & Jean Bethke Elshtain, eds., 2006). Scruton adds: “Marriage has grown up around the idea of sexual difference and all that sexual difference means.” *Id.*

⁶³ *ECCLESIASTICUS* 44 10-13 (NEW JERUSALEM BIBLE, 1985 ed., at 1141).

⁶⁴ See generally WILLIAM MARSIGLIO & SALLY HUTCHINSON, *SEX, MEN, AND BABIES: STORIES OF AWARENESS AND RESPONSIBILITY* (2002).

⁶⁵ See n. 48, *supra*.

⁶⁶ See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

that cohabitation and out-of-wedlock childbirth are promising alternatives. Notoriously, people do cohabit in increased numbers (and have increasingly begotten children outside of wedlock).⁶⁷ Studies establish that cohabitation is associated with deleterious outcomes for those who practice it, compared to marriage,⁶⁸ including an increased probability of relational breakdown⁶⁹ and an increased probability of divorce if later the couple does marry.⁷⁰

Cohabitation is bad for the offspring.⁷¹ Its instability means an unstable home for the children. “Fully three-quarters of children born to cohabiting

⁶⁷ Current statistics on cohabitation and on out-of-wedlock births are available in “America’s Children: Key National Indicators of Wellbeing,” an annual compendium available at www.childstats.gov. See Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 285-86 (2005) (“The number of unmarried couples has increased by over 300 percent in the last twenty years. * * * By 2000, one-third of all children born in the United States were born out of wedlock.”); Larry Bumpass & Hwien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUDIES 29 (2000) (available on jstor) (“Cohabitation has grown from a rare and deviant behaviour to the majority experience among cohorts of marriageable age” (at 29); “many unmarried births occur in two-parent cohabiting families” (at 30); the trend is upwards (at 34-35)).

⁶⁸ Studies are analyzed and their implications described in DAVID POPENOE & BARBARA DAFOE WHITEHEAD, *SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE* (2d ed., 2002), available at <http://marriage@rutgers.edu> (accessed November 26, 2006) and in LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* ch. 5 (2000).

⁶⁹ See notes 42-43, *supra*.

⁷⁰ See NICHOLAS H. WOLFINGER, *UNDERSTANDING THE DIVORCE CYCLE: THE CHILDREN OF DIVORCE IN THEIR OWN MARRIAGES* 68 (2005) (“Both premarital childbirth and premarital cohabitation are strong predictors of divorce.”); DAVID POPENOE & BARBARA DAFOE WHITEHEAD, *SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE* (2d ed., 2002), available at <http://marriage@rutgers.edu> (accessed November 26, 2006).

⁷¹ See Susan L. Brown, *Family Structure Transitions and Adolescent Well-being*, 43 DEMOGRAPHY 447 (2006), abstract available online at <http://muse.jhu.edu/cgi-bin/access.cgi?url=/journals/demography/v043/3brown.html> (accessed Nov. 26, 2006):

“[C]ohabitation is often associated with poorer outcomes [for adolescents]. Moving out of a cohabiting stepfamily into a single-mother family was not harmful and was actually associated with improvements in school engagement. Moving into a cohabiting stepfamily from a single-mother family decreased adolescent well-being, and this impact was greater than that experienced by those who moved into a married stepfamily. Stable cohabiting stepfamilies were associated with lower levels of well-being than stable married stepfamilies.”

See Robin Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42(3) SAN DIEGO L. REV. 847 (2005) (available at www.Law.Umaryland.Edu/faculty_publications.a_sp?facultynum=280); Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351 (2004), abstract available at www.ingentaconnect.com/content/bpl/jomf/2004 (accessed Nov. 26, 2006) (“Children living in two-

couples are likely to see their parent split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate.”⁷² The deleterious effects which ensue for the offspring include effects on their procreative futures.⁷³

Another frequent outcome may be “marriage lite:” that is, wedded relationships in which the couple adopt a tentative or provisional attitude towards their marriage, considering it to be “glued together” only by the prospect of continued “emotional gratification”⁷⁴ and regarding it as subject to termination when gratification subsides.⁷⁵ The “liteness” of this kind of

biological-parent cohabiting families experience worse outcomes, on average, than those residing with two biological married parents.”). But see Wendy D. Manning & Susan Brown, *Children’s Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & THE FAMILY 345 (2006), abstract available online at <http://blackwell-synergy.com/doi/abs/10.1111/j.1741-3737.2006.00257.x> (accessed Nov. 26, 2006):

“Our findings suggest that children can potentially benefit [economically] from living with a cohabiting partner whose resources are shared with family members. Although children living with married rather than cohabiting parents fare better in terms of material well-being, this advantage is accounted for by race and ethnic group and parents’ education.”

(abstract). Earlier studies are described in JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 6-7 (2002).

⁷² DAVID POPENOE & BARBARA DAFOE WHITEHEAD, *SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE* 8 (2002) available at marriage@rutgers.edu (accessed November 26, 2006). See Larry Bumpass & Hwien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUDIES 29, 38 (2000)(available on jstor)(“Children born to cohabiting parents . . . may spend about a quarter of their childhood years with a single-parent family, a quarter with a cohabiting parent, and less than half with married parents. . . . * * * Children born to married parents spend the vast majority (84 per cent) of their childhood in two-parent families.”).

⁷³ See Larry Bumpass & Hwien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUDIES 29, 35 (2000)(available on jstor)(“Parents who shared a cohabiting family with their children are likely to find it difficult to argue effectively that their children should abstain from either unmarried sex or cohabitation” – “yet another feedback loop in the inter-generational aspects of the declining significance of marriage.”); Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 AMERICAN SOCIOLOGICAL REV. 210 (1993)(available on jstor) (discussing the “widely replicated finding . . . that a woman who grows up in a nonintact family is more likely to bear a child before marrying . . .”(page 210))

⁷⁴ See MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 259 (1996), quoting FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 6 (1991). (“emotional gratification has become the *sine qua non* of married life. It is the main glue that holds couples together.”). For authorities commending emotion as a fundamental good of “attachments” generally, see note 17, *supra*.

⁷⁵ Authorities noting the high divorce rate and also attitudes towards marriage and divorce are reviewed in NICHOLAS H. WOLFINGER, *UNDERSTANDING THE DIVORCE CYCLE: THE CHILDREN OF*

relationship likely entails a failure fully to satisfy several of the requirements of procreative justice, as it involves a diminution in the fidelity and mutual knowledge and benevolence of the spouses.

When divorce ensues, as it often does, the offspring are liable to incur many adverse effects. Paul Amato finds that “[c]ompared to children with continuously married parents, children with divorced parents continued to score significantly lower on measures of academic achievement, conduct, psychological adjustment, self-concept and social relations”⁷⁶ and “tend to obtain less education, earn less income, have more troubled marriages, have weaker ties with parents, and report more symptoms of psychological distress. * * * [They] are more likely to drop out of high school, less likely to attend college, more likely to be unemployed, and [they are] more likely to experience economic hardship as adults”⁷⁷ They are often raised by single parents or by reconstituted couples, preponderantly by their biological mother alone or with a new partner.

“[D]ivorced single mothers, compared with continuously married mothers, tend to show less warmth toward their children, engage in harsher punishment, and monitor their children less effectively With respect to fathers, postdivorce visitation arrangements make it difficult for noncustodial fathers to maintain close ties with their children. As a result, many fathers visit their children infrequently and gradually disengage from their children's lives.”⁷⁸

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DIVORCE IN THEIR OWN MARRIAGES 76-81 (2005) and in Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189 (2003).

⁷⁶ Paul R. Amato, *Children of Divorce in the 1990's: An Update of the Amato & Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355 (2001), abstract available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11584788&dopt=Citation (accessed January 25, 2007). See ANDREW J. CHERLIN, PUBLIC AND PRIVATE FAMILIES: AN INTRODUCTION 430 (4th ed., 2005)(concluding after a review of the literature that “the majority of offspring who experienced parental divorce probably would have been better off if their parents had stayed together.”); ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005); JUDITH WALLERSTEIN, JULIA LEWIS, & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000).

⁷⁷ Paul R. Amato & Jacob .Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAMILY 191 (2005), available at www.blackwell-synergy.com (accessed December 2, 2006).

⁷⁸ *Id.*

“A large body of social scientific evidence now shows that the risk of physical or sexual abuse rises dramatically when children are cared for in the home by adults unrelated to them, with children being especially at risk when left at home with their mothers’ boyfriends.”⁷⁹

Adverse effects ensue for the offsprings’ procreative futures:

“Research has consistently suggested that marital discord and divorce are transmitted across generations. Compared with spouses with continuously married parents, spouses with divorced parents tend to report less marital satisfaction . . . engage in more conflict. . . , and think about divorce more often. . . . Similarly, parental divorce is associated with a greater likelihood of seeing one’s own marriage end in divorce. . . .”⁸⁰

⁷⁹ *The Future of Family Law: Law and the Marriage Crisis in North America* 39 (Dan Cere, Principal Investigator, 2005), available at <http://www.marriageinstitute.ca/pages/CEREFUTURE.pdf> (accessed December 2, 2006). See generally Marcia J. Carlson, *Family Structure, Father Involvement, and Adolescent Behavioral Outcomes*, 68 JOURNAL OF MARRIAGE AND FAMILY 137 (2006), available online at <http://www.blackwell-synergy.com/doi/full/10.1111.j.1741-3737.2006.00239.x> (accessed Nov, 26, 2006):

“Extensive research has shown that living apart from one’s biological father is associated with a greater risk of adverse outcomes for children and adolescents, regardless of race, education, or mothers’ remarriage . . . * * * Compared to children living with two married biological parents, children living apart from their fathers are, on average, more likely to be suspended or expelled from school . . . more likely to engage in delinquent activities . . . more likely to experience depression or anxiety . . . and more likely to report externalizing and internalizing behavioral problems”

(first paragraph).

⁸⁰ Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAMILY 191 (2005), available at www.blackwell-synergy.com (accessed December 2, 2006). See NICHOLAS H. WOLFINGER, *UNDERSTANDING THE DIVORCE CYCLE: THE CHILDREN OF DIVORCE IN THEIR OWN MARRIAGES* (2005) (passim: see especially page 74: “Parental divorce increases the chances of offspring divorce by at least 40 percent”); JUDITH WALLERSTEIN, JULIA LEWIS, & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* xxix (2000):

“Contrary to what we have long thought, the major impact of divorce does not occur during childhood or adolescence. Rather, it rises in adulthood as serious romantic relationships move center stage. When it comes time to choose a life mate and build a new family, the effects of divorce crescendo. A central finding of my research is that children identify not only with their mother and father as separate individuals but with the relationship between them. They carry the template of this relationship into adulthood and use it to seek the image of their new family. The absence of a good image negatively influences their search for love, intimacy, and commitment. Anxiety

The adverse effects are passed on to future generations:

“Grandparents’ decisions to divorce predict less education, greater marital discord, and weaker ties with parents two generations later. . . . These findings are particularly striking when we consider that the great majority of grandchildren were not yet born when these divorces occurred. . . . [F]amily problems can persist across generations, with divorce (and perhaps other family problems correlated with divorce) in one generation resulting in lower educational attainment and problematic family relationships in the second generation, and these outcomes in turn becoming the causes of similar problems in the third generation. . . . Parents who fight frequently or divorce may increase the risk of a variety of problems, not only for their children, but also for their children’s children.”⁸¹

4. *The Special Importance of a Good Model.* -- Few of the basic problems of life, least of all this one, are amenable to solution solely through the perusal of books

leads many into making bad choices in relationships, giving up hastily when problems arise, or avoiding relationships altogether.”

See ANDREW J. CHERLIN, *PUBLIC AND PRIVATE FAMILIES: AN INTRODUCTION* (4th ed., 2005)(reporting that “[a] number of studies show that persons whose parents divorced while they were growing up are more likely than others to become divorced themselves” (at 415); offering some criticisms of the Wallerstein study but accepting that “her basic point that the effects of divorce can sometimes last into adulthood . . . is valid” (at 429); and reporting findings that people whose parents divorced “seemed just as happy with their marriages” but “were more likely to think that their marriages were in trouble” and among those who reported their marriages as less than very happy “more likely to argue frequently and to shout or hit while arguing” (at 430)); Larry Bumpass & Hwien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 *POPULATION STUDIES* 29 (2000)(available on jstor)(reviewing the literature and reporting that “[c]hildren from single-parent families are more likely . . . to enter sexual activity earlier and have premarital births . . . to cohabit . . . and to marry early and experience the disruption of their own marriages” (at pages 29-30)). Stephamie Staal, reporting her own experience and those of other offspring of divorced parents, reports “fear of intimacy” and notes that “[w]ithout a healthy model of intimacy as reference, we may internalize a skewed picture of marriage that we unwittingly recreate through our own behavior and in our choice of partner.” STEPHANIE STAAL, *THE LOVE THEY LOST: LIVING WITH THE LEGACY OF OUR PARENTS’ DIVORCE* 20, 177 (2000). She reports, among the offspring of divorce, widespread “apprehension about having children of their own [and a fear that] . . . they would pass down a legacy of divorce to their children.” *Id.* at 226. See generally Karin Grossmann, Klaus E. Grossmann & Heinz Kindler, *Early Care and the Roots of Attachment and Partnership Representations*, in *ATTACHMENT FROM INFANCY TO ADULTHOOD: THE MAJOR LONGITUDINAL STUDIES* 98, 126 (Klaus E. Grossmann, Karin Grossmann & Everett Waters, eds., 2005)(“Mothers’ as well as fathers’ sensitive supportiveness, acceptance of the child, and appropriate challenging behaviors . . . were powerful predictors of . . . close relationships in young adulthood.”).

⁸¹ Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 *J. MARRIAGE & FAMILY* 191 (2005)(“Conclusion”), available at www.blackwell-synergy.com (accessed December 2, 2006).

and articles. The most prominent media of our own age present, in any case, a highly distorted set of impressions, tending to degrade the erotic and to disconnect close personal affiliations from the requirements of justice.⁸² The same may be true of sex-education programs in the schools:

“[They] impart knowledge without substance or meaning. Love, affection, and tenderness are not part of the educational portrayal of sex. [Kay Hymowitz] describes an AIDS prevention program that issued flashcards to students who were supposed to arrange them in the correct order (an example of the ‘robotization’ of sex. The one labeled ‘Talk with Partner’ was to go first. Another card of equal size to be placed last said, ‘Throw condom out.’”⁸³

An offspring – today’s offspring more than those of earlier eras – therefore needs a worthwhile model from an early age and for a long time. It is “due.” A procreative affiliation is therefore fully just only when it models a solution to the great problem of integrating erotic and responsible love, and only when it provides a guide to participation in the special procreative goods.

5. *Marriage.* -- Marriage between a man and a woman uniquely satisfies this requirement.⁸⁴ As one authority puts it:

⁸² See Roger Scruton, *Sacrilege and Sacrament*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET & MORALS* 3, 16 (Robert P. George & Jean Bethke Elshtain, eds., 2006):

“There is a picture of human sexuality propagated by the media, by popular culture, and by much sex education in our schools, which tries both to discount the difference between us and the other animals and also to remove every hint of the forbidden, the dangerous, and the sacred. It is a picture that makes no place for shame, save as a lingering disability, and which describes the experience of sex as a kind of bodily sensation. Sexual initiation, according to this picture, means learning to overcome guilt and shame, to put aside our hesitations, and to enjoy what is described in the literature as ‘good sex.’ The function of sex education in schools . . . is to rescue children from the commitments that have been attached to desire by displaying sex as a matter of cost-free pleasure.”

⁸³ Mark Daims, *Book Review: Liberation’s Children: Parents and Kids in a Postmodern Age*, 4 *HUMAN NATURE REVIEW* 44 (2004).

⁸⁴ See Sandra L. Hofferth, *Residential Father Family Type and Child Well-Being: Investment Versus Selection*, 43 *DEMOGRAPHY* 53 (2006) abstract available at <http://muse.jhu.edu/cgi-bin/access.cgi?url=/journals/demography/v043/43.1hofferth.html> (accessed Nov. 26, 2006) (“Children in all family types except the married-biological-parent family showed higher levels of behavioral problems.”); Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, *CHILD TRENDS* (June, 2002), available at <http://www.childtrends.org/files/Marriage8602..pdf>. (accessed August 22, 2006):

“[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and

“Children learn about male-female relationships through the modeling of their parents. Parental relationships provide children with a model of marriage – the most meaningful relationship that the vast majority of individuals will have during their lifetimes.”⁸⁵

Marriage between a man and a woman uniquely involves procreative *eros* and its integration into the projects of procreative justice. Well conducted, marriage exemplifies a loving relationship between a man and a woman which is free of the giddiness, embarrassment and shame which afflicts many of the episodic alliances of adolescence. Well conducted, marriage exemplifies the avoidance of adultery and the practice of periodic abstinence. (Where else but from a good father can a young man find an example, seldom available among his pals, of a man he admires and loves steering away from attractive women and curbing his sexual appetites for the sake of a family?)⁸⁶ Well conducted, marriage exemplifies the sacrificial character of pregnancy and honors the sacrality of the newly born.

PART FIVE: SAME-SEX AFFILIATIONS

children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children.”

(at page 6). See Dean Lillard & Jennifer Gerner, *Getting to the Ivy League: How Family Composition Affects College Choice*, 70 J. HIGHER ED. 706 (1999), available at www.jstor.org.proxy.bc.edu (accessed October 9, 2006)(students who lived with both biological parents were more likely to apply to, be admitted to, and to attend a four-year college and a great deal more likely to attend a selective college). See also ANDREW J. CHERLIN, PUBLIC AND PRIVATE FAMILIES : AN INTRODUCTION 309 (4th ed., 2005)(concluding, after a review of the literature, that “it is better for children to be raised by two parents than one.”).

⁸⁵ A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6 J. L. & FAMILY STUDIES 213 (2004).

⁸⁶ See DAVID POPENOE, LIFE WITHOUT FATHER 157 (1996):

“Males from fatherless homes learn that they are not expected to contribute to child care and that therefore no reproductive advantage is to be gained by carefully choosing a compatible mate and postponing reproduction. Instead, such males engage in competitive struggles with other males for short-run sexual conquests, struggles which typically involve aggression and exploitative behavior.”

Popenoe is here relying on Patricia Draper & Henry Harpending, *A Sociobiological Perspective on the Development of Human Reproductive Strategies*, in SOCIOBIOLOGICAL PERSPECTIVES ON HUMAN DEVELOPMENT 340 (Kevin B. MacDonald, ed., 1988).

Same-sex affiliations are not procreatively just under the criteria set forth above. This is the case even in the instance of those same-sex affiliations which most nearly resemble traditional marriage.

I. The First Six Requirements.

Same-sex affiliations are likely to fail to satisfy some of the first six requirements. They may fall short because same-sex couples lack the biological incentives which spur on biological parents. “[P]eople who conceive a child . . . will . . . be the most invested in its nurture”⁸⁷ and people who procreate an offspring who will some day procreate the way the his parents did have a greater investment still.

Furthermore, if homosexual conduct is wrongful and homosexual inclinations are disordered, as many thinkers throughout history have maintained, and as many religious bodies such as orthodox Judaism, Catholicism and Islam have taught, it follows that affiliations which include homosexual practices and stimulate homosexual inclinations are deleterious to the parties morally and spiritually. If same-sex affiliations are unstable, as findings from the social sciences indicate, then they may be harmful in various practical ways as well.⁸⁸ Affiliates who sustain associations which are bad for both of them cannot

⁸⁷ Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET & MORALS* 29, 36 (Robert P. George & Jean Bethke Elshtain, eds., 2006)(referring to the quoted proposition as a “widely held assumption” but, apparently, embracing it. The authors also note “the observation that . . . children themselves want – indeed, often *long* – to be raised by those who gave them life.”). See generally STEPHANIE STAAL, *THE LOVE THEY LOST: LIVING WITH THE LEGACY OF OUR PARENTS’ DIVORCE* 163 (2000)(in biological families, “[t]he primitive stirrings of belonging start on the surface, and when children grow up in a loving family – with two parents at the helm – their physical similarities to each side of the family are usually celebrated. A child has her mother’s eyes, or her father’s musical talent, her great-grandmother’s temper, her great-grandfather’s hair. Every genetic echo whispers that the children belong, that a shared history unfolds within them.”).

⁸⁸ As to instability, See George A. Rekers, *An Empirically Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325, 342 (2005)(“Homosexual partner relationships are *significantly and substantially less stable and more short-lived* on the average compared to a marriage of a man and a woman.” (emphasis in original); the research supporting this conclusion is set forth at 342-46). The comparative instability of homosexual affiliations persists in places where they are {**} {* accorded *} legal recognition. See Gunnar Andersson, Turid Noack, Ane Seierstad & Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006), abstract available at <http://muse.jhu.edu/journals/demography/toc/dem43.1.html> (accessed January 26, 2007)(“divorce levels are considerably higher in same-sex marriages.”(abstract)).

As to other effects, see Rekers, *supra*: at 330-14 (reviewing the literature); Rekers concludes (at page 341) that:

be entirely beneficent towards one another. Such affiliates therefore fail to satisfy the third requirement of procreative justice.

Social orders may reasonably refuse full recognition to affiliations which are bad for their members. American society refuses it to same-sex affiliations.⁸⁹ Under these circumstances, same-sex affiliations violate the sixth requirement of procreative justice.

B. The Seventh Requirement.

Same-sex relationships always fail to satisfy the seventh requirement of procreative justice. They either leave *eros* aside altogether or they involve *eros* in a special way, divergent from the form it will take for the great majority of the offspring and thus unsuccessful as their model for the great problematic of procreative responsibility. Such associations cannot model the erotic benevolence unique to men and women, nor can they exemplify the inter-gender knowledge which is unique to men and women. They do not recapitulate and ramify themselves, generation after generation.⁹⁰

“heterosexual adults generally have significantly and substantially better health, more energy, and better emotional stamina to devote to children, without the level; of physical and emotional health problems and substance abuse that interfere with daily activities among homosexual adults.”

See *id.* at 381-86 for a review of the literature indicating the prevalence of AIDS and other sexually transmitted diseases among homosexual couples.

⁸⁹ See George A. Rekers, *An Empirically Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, 18 ST. THOMAS L. REV. 325, 359-62 (2005)(reviewing the literature establishing that the public generally disapproves of homosexual conduct, homosexual marriage, and homosexual adoption.).

⁹⁰ Studies from the social sciences are inconclusive as to the effects of same-sex parenting on the procreative future of the child. Such studies and their limitations are discussed in ANDREW J. CHERLIN, *PUBLIC AND PRIVATE FAMILIES: AN INTRODUCTION* 323-14 (4th ed., 2005) and in Judith Stacey & Timothy J. Biblarz, (How) Does Sexual Orientation of Parents Matter?, 66 AM. SOC. REV. 159 (2001). See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 MARRIAGE AND CHILD WELL-BEING 97 (2005)(available on jstor)(“After considering the methodological problems . . . that have bedeviled this literature, . . . the authors find that the children who have been studied are doing about as well a children normally do. What the research does not yet show is whether the children studied are typical of the general population of children raised by gay and lesbian couples.” *Id.* at 97); Walter R. Schumm, *Empirical and Theoretical Perspectives from Social Science on Gay Marriage and Child Custody Issues*, 18 ST. THOMAS L. REV. 425 (2005); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 DEV. & BEHAV. PEDIATRICS 224 (2005); Lynn D. Wardle, *The “Inner Lives” of Children in Lesbian Gay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511 (2006) (discussing the exposure of foster and adoptive children

PART SIX: THE INJUSTICE OF RECOGNIZING SAME-SEX AFFILIATIONS AS MARRIAGES

When a legal or governmental authority identifies same-sex affiliations as marriages, it acts unjustly, contravening all three of the basic principles of justice.

It does harm insofar as people follow its guidance. (Part Seven discusses the extent to which that may occur.). It deprives people of their due when an authority or leader, charged with responsibilities comparable to that of a lifeguard, a trustee or a guardian, misleads those who rely on him. It falls short as regards the third aspect of justice by treating as the same things that are different, and by conflating procreatively just affiliations with associations which fall short of fulfilling the requirements of procreative justice.

PART SEVEN: HOW EXTENSIVE MAY BE THE HARM ENSUING UPON LEGAL RECOGNITION OF SAME-SEX MARRIAGE⁹¹

When a leading legal authority mandates that same-sex associations be treated like marriages, the consequences are extensive. The full ramifications must take generations to unfold, but some shorter-term consequences can be identified by considering developments in Massachusetts (and in those few

to the gay lifestyle of their caregivers); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 292-95 (2005); Lynn D. Wardle, *Adult Sexuality, the Best Interest of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J. L. & FAM. STUD. 59 (2004).

For an example of research in this area see Nanette Gartrell, Carla Rodas, Amalia Deck, Heidi Payer & Amy Banks, *Interviews with Ten-Year-Old Children*, 70(4) AMERICAN JOURNAL OF ORTHOPSYCHIATRY (2005), available at <http://www.nllfs.org/publications/pdf/tenyearolds.pdf> (accessed December 17, 2006)(asserting that "in social and psychological development, the children [of lesbian parents] were comparable to children raised in heterosexual families" based on a "self-selected" sample of seventy-eight mothers all originally residents of the Boston, Washington, D.C., and San Francisco areas, mostly college educated (67%) and middle or upper-middle class (82%); "[r]ecruitment was solicited via announcements at lesbian events, in women's bookstores, and in lesbian newspapers"; data on the well-being of the children consisted almost entirely of statements made by the mothers.)

⁹¹ Some of the material in this section is from Scott FitzGibbon, "Social Developments in Massachusetts and Elsewhere Ensuing Upon Same-Sex Marriage Initiatives: Testimony in Support of the Federal Marriage Amendment," published in SSRN, paper number 86998 (testimony delivered on October 20, 2005 before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Committee).

foreign jurisdictions whose legal institutions have, as in Massachusetts, mandated legal recognition of same-sex marriage).⁹²

I. Legal Recognition of Same-Sex Marriage Encourages Social Recognition of Same-Sex Marriage.

A. In Higher Education and Among the Social Elite.

Legal recognition of same-sex marriage encourages social promotion of same-sex marriage in prominent universities. Here is one instance from Massachusetts:

"Last weekend, on the Fourth of July, Cambridge saw one of its most prominent lesbian couples marry at Memorial Church in Harvard Yard. Professor Diana Eck, of Harvard Divinity School, and her partner, the Reverend Dorothy Austin, who ministers at the famed church, wed amid a crowd of well-wishers that included Supreme Judicial Court chief justice Margaret Marshall. And not only did the brides purposely choose Independence Day for their nuptials, the ceremony's final hymn was "America" ("My Country 'Tis of Thee")."⁹³

B. In the Schools.

Legal recognition of same-sex marriage encourages the promotion of same-sex relationships by public school teachers and administrators. A few months after the Massachusetts same-sex marriage decision, Thomas W. Payzant, Superintendent of the Boston Public Schools,⁹⁴ issued a memorandum to the

⁹² This Part Seven considers developments in the social order, leaving aside the (likely extensive) further legal developments. Marriage is the axle upon which the entirety of family law pivots, so its definition is likely to affect doctrines pertinent to visitation rights and custody, for example. Hundred of doctrines outside of family law which refer to marriage and the family are likely to be affected as well. Marital status has been identified as implicated in more than a thousand federal laws. See Letter from GAO Associate General Counsel Barry Bedrick to the Hon. Henry Hyde dated January 31, 1997, GAO/OGC-97-16; GAO-04-353R, Defense of Marriage Act; letter from GAO Associate General Counsel Dayna K. Shah to the Hon. Bill Frist, dated Jan. 23, 2004.

⁹³ http://www.bostonphoenix.com/boston/news_features/other_stories/multi-page/documents/03979297.asp.

⁹³ Michael Bronski, "Altar Ego: Why some queer political activists are raising questions about the limits and long-term worth of same-sex marriage", BOSTON PHOENIX, July 16-22, 2004, available at http://www.bostonphoenix.com/boston/news_features/other_stories/multi-page/documents/03979297.asp. (accessed January 26, 2007).

⁹⁴ Thomas Payzant has subsequently been given an appointment at Harvard. See "Thomas Payzant Named HGSE Senior Lecturer" (article dated April 26, 2006 on the web cite of the Harvard Graduate School of

Boston School System announcing that “[t]his is a historic moment in our Commonwealth and in our country” and that the decision “continues to have, a profound impact on our civil life and discourse” which “filters through our society and our schools.”⁹⁵ Superintendent Payzant’s memorandum establishes a “zero-tolerance policy”:

“Administrators, teachers, parents and students are reminded that no action or speech will be tolerated that results in harassment, discrimination, bias or intimidation toward any member of our community for any reason, including his/her sexual orientation or perceived sexual orientation. We urge school staff to report and act promptly on any incidents that may create a climate of intolerance in our schools. Such incidents will be considered a serious violation of the BPS Code of Discipline . . . and will result in discipline up to and including expulsion of the responsible student or termination of the offending employee.”

After this, a teacher would take her career into her hands by encouraging an examination of the cons as well as the pros of same-sex marriage.⁹⁶

A further development has been the introduction of vivid and sometimes graphic presentation of various sexual practices, as indicated in the following interview on National Public Radio program of an eighth-grade teacher in Brookline, Massachusetts:

“[Teacher] In my mind, I know that, ‘OK, this is legal now.’ If somebody wants to challenge me, I’ll say, ‘Give me a break. It’s legal now.’

“SMITH: And, [she] says, teaching about homosexuality is also more important now. She says the debate around gay marriage is prompting kids to ask a lot more questions, like what is gay sex, which [she] answers thoroughly and explicitly with a chart.

“[Teacher]: And on the side, I’m going to draw some different activities,

Education, www.gse.harvard.edu/news_events/features/2006/04/26_payzant.html (accessed September 9, 2006).

⁹⁵ Memorandum dated May 13, 2004 (first paragraph).

⁹⁶ The way the memorandum is drafted, she violates the rules even if she has no bias; all she need do is say something that causes someone else to develop bias. If the teacher says nothing at all, she still may have to worry about an obligation to blow the whistle if one of her students says something unpleasant (“report and act promptly on any incidents that may create a climate of intolerance”). And as to advising a student about concerns in his social life, the mind boggles. He better not exhibit bias in the way he conducts it.

like kissing and hugging, and different kinds of intercourse. All right?

"SMITH: [She] asks her students to fill in the chart with yeses and nos.

"[Teacher]: All right. So can a woman and a woman kiss and hug? Yes. Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, 'Hold it. Of course, they can. They can use a sex toy.

. . . [A]nd we talk -- and we discuss that."⁹⁷

The effect of the Massachusetts same-sex marriage decision has been to encourage the indoctrination of public school students in the merits of same-sex relationships; and in other jurisdictions, similar pressures have been felt:

"In the wake of Canada's legalization of same-sex marriage, a human-rights complaint has been filed in British Columbia alleging the absence of pro-homosexual instruction in public schools is a denial of equal treatment. . . . [Petitioner] wants [the curriculum] changed to include: 'Queer history and historical figures, the presences of positive queer role models . . . the contributions made by queers to various epochs, societies and civilizations, and legal issues relating to [lesbian, gay, bisexual, transgendered] people, same-sex marriage and adoption.'"⁹⁸

II. Legal Recognition of Same-Sex Marriage Can be Predicted to Lead on to Degradation of Beliefs and Practices as to Heterosexual Marriage and the Family.

The Massachusetts same-sex marriage decision and others like it project what might almost be called a theory of marriage, or at least a certain "take" on how to think about that institution and what it means. That "profound impact on our civil life and discourse" to which Superintendent Payzant portentously referred⁹⁹ would include an impact not only on practice but on thought and belief as well.

⁹⁷ *All Things Considered*, September 13, 2004.

⁹⁸ "Brave New Schools: Complaint demands 'pro-gay' studies for kids: Canada's legalization of same-sex marriage prompts case," article in © 2005 WorldNetDaily.com http://worldnetdaily.com/news/article.asp?ARTICLE_ID=42529 (Posted January 25, 2005). (The bracketed material is included, bracketed, in the original.).

⁹⁹ Memorandum from Thomas W. Payzant, Superintendent, Boston Public Schools dated May 13, 2004 paragraph one.

The marital morality of the Massachusetts and other same-sex marriage authorities displays several important features. The first might be called “positivism”: the view that things all come down to the mandates of the State. The Massachusetts court announced:

“[T]he terms of marriage – who may marry and what obligations, benefits, and liabilities attach to civil marriage – are set by the Commonwealth.”¹⁰⁰

“[T]he government creates civil marriage.”¹⁰¹

Statements like these close the door firmly on the nonpositive roots of the institution of marriage and on nonpositive, extra-state authorities for defining and understanding it; sources widely relied on in judicial authorities until recent decades, namely custom, nature, tradition, and religion. Indeed, statements in some same-sex marriage cases bluntly excoriate the marital beliefs of the citizenry. “[L]ike it or not,” a Hawaii court announced, “constitutional law may mandate ... that customs change.”¹⁰² “[R]ooted in persistent prejudices,” concludes the Massachusetts court.¹⁰³ “[F]undamentally repugnant,” states an Ontario court.¹⁰⁴

The second feature of the same-sex marriage authorities might be called “deconstruction.” This feature arises from the circumstance that Massachusetts has adopted no comprehensive definition of marriage, either as a matter of the common law or as a matter of statute; people have generally understood what marriage meant through custom, tradition, religion, and morality. The Supreme Judicial Court’s same-sex marriage decision called everything into question, put everything up for litigation and challenge, and closed the door on the most obvious bases for reaching a solution. Marriage is something defined by the state, we are told; but then the state does not define it.¹⁰⁵

¹⁰⁰ *Goodridge v. Department of Public Health*, 440 Mass. 309, 321, 798 N.E.2d 941, 954 (2003).

¹⁰¹ *Id.*

¹⁰² *Baehr v. Lewin*, 74 Haw. 530, 570 (1993).

¹⁰³ *Goodridge v. Department of Public Health*, 440 Mass. 309, 341, 798 N.E.2d 941, 968 (2003).

¹⁰⁴ *Halpern v. Canada*, 215 D.L.R. (4th) 223 (Can.), par. 243 (“Any justification based upon the belief that heterosexual relationships are superior to same-sex relationships would be rejected as being ‘fundamentally repugnant’”).

¹⁰⁵ There is some language in *Goodridge* which aims at a definition: “the voluntary union of two persons as spouses, to the exclusion of all others.” *Goodridge v. Department of Public Health*, 440 Mass. 309, 343, 798 N.E.2d 941, 969 (2003). This impossibly vague language – leaving aside the use of the term “spouses,”

A third feature of some judicial authorities in this area is a derogatory attitude towards moral normativity. The Massachusetts court, in its same-sex marriage decision, referred to the desirability of “defin[ing] the liberty of all, not . . . mandat[ing] our own moral code.”¹⁰⁶ Justice O’Connor’s concurring opinion in *Laurence v. Texas* seeks “other reasons . . . to promote the institution of marriage beyond mere moral disapproval of an excluded group” (turning, instead, to “state interest”).¹⁰⁷ Note that this third feature is not merely an extension of the first: it seems to be not only social morals, or religious morals, or objective ethical morals which are to be avoided, but even positive, legal moralizing (“our own” moral order). Fixed standards of conduct are to be generally suspect, it seems, and subject to derogation when they conflict – as they almost always do – with liberty very broadly defined as “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁰⁸ Law and morality survive only in those (undefined and shifting) circumstances in which it serves the “interests” of the state.

The fourth feature, inevitably, is confusion and the possibility of infinite malleability in the meaning and conduct of marriage, both socially and as a matter of law. “[C]ivil marriage,” the Massachusetts court announced in its same-sex marriage opinion, “is an evolving paradigm.”¹⁰⁹

In Toronto recently, two heterosexual men, still heterosexual, each still interested in finding a woman to love, decided to take advantage of that jurisdiction’s same-sex marriage law and marry one another. (For the tax advantage, they said). They have been advised by counsel that they are eligible to do so.¹¹⁰ Same-sex marriage authorities say little or nothing about the purposes and activities which couples need to perform or intend.

Not only same-sex marriage but also heterosexual marriage and the terms which define the traditional family tumble into this post-modern void. The barriers between marriage and cohabitation collapse. The furthest extension to date may appear in a recent provision in Ontario where the legislature, under the

which is in this context a redundancy – would make a two-person law partnership or hiking trip into a marriage.

¹⁰⁶ *Id.*, 798 N.E. 2d at 948, *quoting* *Laurence v. Texas*, 123 S. Ct. 2472, 2480 (2003).

¹⁰⁷ 539 U.S. 558, 123 S. Ct. 2472, 2487-88 (2003).

¹⁰⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), *quoted in* *Laurence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

¹⁰⁹ *Goodridge v. Department of Public Health*, 440 Mass. 309, 339, 798 N.E.2d 941, 967 (2003).

¹¹⁰ Lesley Wright, “Wedding Cashers,” *TORONTO SUN*, August 6, 2005.

prodding of a judicial mandate to revise marriage-related terminology in its statutes, redefined “spouse” to include people who are not married. See Bill 56 (2004), amending the Employment Standards Act to make the term “spouse” include:

“either of two persons who . . . live together in a conjugal relationship outside marriage.”¹¹¹

Your spouse might be someone you are *not* married to? The ultimate social consequence of the same-sex marriage authorities may be the destruction of the sense of the ridiculous.

The trajectory leads on to the recognition of all sorts of “pair-bonded” structures -- including those intended to be temporary rather than permanent. It implies the “nonjudgmental” attitude recommended by a sociologist:

“[Policy makers] could attempt to create policies to support and help people in whatever type of social structures they create, giving equal credence and respect to divorced and married people, cohabiting and married couples, to children born out of wedlock and children born to married couples, and to married and unmarried parents.

“The implications of the emerging pair-bonding paradigm for social policy makers is that social policies need to support people as they enter into, reside within, and move to whatever pair-bond structures fit their needs and goals. . . . Social policies must be based on respect for people’s right to choose . . . to live . . . within any particular pair-bond structure.”¹¹²

And there seems to be no reason why only *pairs* should be supported and recognized. Polygamy – the absurdity to which same-sex marriage advocates resisted being reduced in argument even two or three years ago¹¹³ – has recently

¹¹¹ Bill 56 (2004)(emphasis added). The text is available on line at http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b056ra_e.htm (accessed October 10, 2005). The Explanatory Note identifies this bill as having been enacted.

¹¹² William M. Pinsof, *The Death of “Till Death Us Do Part”: The Transformation of Pair-Bonding in the 20th Century*, 41 FAMILY PROCESS 135 (2002), available at <http://www.blackwell-synergy.com.proxy.bc.edu/doi/full/10.1111/j.1545-5300.2002.41202.x> (accessed January 26, 2007). The author is identified as “President of the Family Institute at Northwestern University and Director of Northwestern’s Center for Applied Psychological and Family Studies.”

¹¹³ “Advocates of same-sex marriage, who held their own State House briefing yesterday, dismissed the argument [that SSM leads to the recognition of polygamy] by their opponents as ‘an old myth’ that has little to do with fundamental rights of people. Carol Rose of the American Civil Liberties Union of Massachusetts said homosexuality is about ‘who they are,’ while multiple marriage ‘isn’t about who you are.’” Raphael Lewis, “Opponents Warn Lawmakers that Polygamy Will be Next,” BOSTON GLOBE,

come to be treated by leading authorities as eligible for legal recognition. A respected Boston columnist sees it on the horizon.¹¹⁴ The head of the ACLU now favors its protection.¹¹⁵

As legal authorities and social policy makers lose their grasp on any coherent and common understanding of marriage, that institution forfeits its definitive status as a matter of general opinion and social practice as well. Marriage becomes harder and harder to distinguish from nonmarital cohabitation. Custom, tradition, and religion may be ruled out as determinative and the slight definitive language in the same-sex marriage authorities is unhelpful.¹¹⁶ Both kinds of relationship are based on “choice.” The most vivid example is afforded by the Ontario amendment, quoted above, which makes one of the Ontario statutes define “spouse” to include people who are not married. In Denmark, where same-sex marriage provisions have been in place for many years, cohabitation is now a “normatively accepted option.”¹¹⁷

CONCLUSION

Marriage in its traditional form is, structurally, a procreatively just affiliation. Cohabitation and same-sex relationships are not. Legal recognition of same-sex relationships as marriage can be predicted to ramify in its consequences, encouraging educational and social promotion of same-sex affiliations and to the acceptance of cohabitation as a substitute for marriage. It can also lead to the degradation of opposite-sex marriage. These developments produce adverse effects on the offspring, including on their procreative futures.

February 10, 2004
http://www.boston.com/news/local/massachusetts/articles/2004/02/10/opponents_warn_lawmakers_that_polygamy_will_be_next/ (accessed October 9, 2005).

¹¹⁴ Jeff Jacoby, “Is Legal Polygamy Next?” BOSTON GLOBE, January 5, 2004.

¹¹⁵ See Crystal Paul-Laughinhouse, “Leader of ACLU talks on agenda,” YALE DAILY NEWS, available at <http://yaledailynews.com/article.asp?AID=27865>:

“In response to a student's question about gay marriage, bigamy and polygamy in certain communities, Strossen [the President of the ACLU] said the ACLU is actively fighting to defend freedom of choice in marriage and partnerships. ‘We have defended the right for individuals to engage in polygamy,’ Strossen said. ‘We defend the freedom of choice for mature, consenting individuals.’”

¹¹⁶ See note 105, *supra*.

¹¹⁷ Cecilie Whehner, Mia Kambskard & Peter Abrahamson, *Demography of the Family: The Case of Denmark*, <http://www.york.ac.uk/inst/spru/research/nordic/denmdemo.pdf> (accessed October 9, 2005).

